IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHILDERIC MAXY,

Petitioner, ORDER

v. 03-C-623-C

KATHY LARSON, FALLEN YAUG,
TODD FISCHER, Officers of
the La Crosse Police Department,

Respondents.

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This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Childeric Maxy, an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He contends that respondents Kathy Larson, Fallen Yaug and Todd Fischer violated his constitutional rights when they refused to allow him to rest before questioning him.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint

liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

Petitioner's claim will be dismissed for failure to state a claim upon which relief may be granted because I cannot reasonably infer from the allegations in his complaint that respondents were deliberately indifferent to a serious medical need.

## ALLEGATIONS OF FACT

Just after midnight on February 27, 2000, petitioner Childeric Maxy was taken to the hospital in handcuffs. He had two large lacerations on his head, which caused him to lose "a tremendous amount" of blood. He stayed at the hospital for nearly three hours; much of that time he was unconscious or incoherent. (Petitioner does not discuss the events leading up to his hospitalization.)

At 3:00 a.m., hospital staff released petitioner to the custody of defendant Todd Fischer, a police officer. Staff gave Fischer plaintiff's "after care instructions," which stated that plaintiff should "rest quietly for about a day." Fischer took petitioner to the La Crosse

police station.

At the police station, petitioner asked defendant Kathy Larson, a police sergeant, for permission to lie down because he was weak and tired. His face was swollen; he could not open his mouth without pain. Although Larson knew that petitioner had been injured, she told him, "I will let you lay down after you speak to me." Petitioner continued to ask Larson if he could lie down, but she refused his requests. Throughout the questioning, petitioner was in pain; he felt weak and dizzy. The pain killers petitioner received at the hospital were wearing off while he was at the police station.

Petitioner told defendant Larson "everything [she] wanted to hear." Nevertheless, Larson yelled at petitioner and ignored his requests to lie down for two and a half hours. Defendant Fischer and defendant Fallen Yaug, another police officer, were present during the entire interrogation but they said nothing. Yaug knew how much blood petitioner had lost.

Around 5:20 a.m., defendant Larson instructed defendants Fischer and Yaug to take petitioner to the county jail. Petitioner still could not stand without assistance.

Since that night, petitioner's vision and memory have deteriorated, he continues to experience headaches and his muscles twitch.

## DISCUSSION

Petitioner makes clear in his complaint that he is not asserting a claim for a violation of his Fifth Amendment right to remain silent. Therefore, I need not consider whether his statements were made voluntarily, Ashcroft v. Tennessee, 322 U.S. 143 (1944) (confession was coerced in violation of Fifth Amendment when it was elicited after suspect had been deprived of sleep for 36 hours), or whether this claim would be barred by Heck v. Humphrey, 512 U.S. 477 (1994), because a ruling in favor of petitioner would call into question the validity of his conviction. Instead petitioner identifies eight "legal theories" under which he is proceeding: (1) "deliberate indifference"; (2) "lack of adequate training"; (3) "supervisor is present on the scene—commit action"; (4) "cruel and unusual punishment"; (5) "mental abuse, verbal abuse and harassment"; (6) "failure to provide police protection"; (7) "conspiracy to violate civil rights"; and (8) "denial of medical (care) treatment."

All of plaintiff's legal theories can be collapsed into a single claim: that respondents violated his constitutional rights by continuing to interrogate him despite his requests to lie down. Because petitioner was a pre-trial detainee when the events giving rising to this lawsuit took place, the Eighth Amendment's prohibition on "cruel and unusual punishment" does not apply. "[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

It is the due process clause of the Fourteenth Amendment that protects individuals in custody that have not yet been convicted. Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003); see also Collins v. City of Harker Heights, 503 U.S. 115, 127-28 (1992) (due process clause "requires that conditions of confinement satisfy certain minimum standards for pretrial detainees, for people in mental institutions, for convicted felons, and for persons under arrest").

The Supreme Court has stated that the due process clause provides protections to pre-trial detainees that are "at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983). However, in practice, there is little difference between the protections provided under the Eighth Amendment and the due process clause of the Fourteenth Amendment. When reviewing prison conditions of pretrial detainees, the Court of Appeals for the Seventh Circuit has applied the same standard as it does for convicted prisoners: whether state officials were deliberately indifferent to a substantial risk of serious harm. E.g., Washington v. LaPorte County Sheriff's Dept, 306 F.3d 515, 517 (7th Cir. 2002); Chapman v. Keltner, 241 F.3d 842, 845 (7th Cir. 2001); Weiss v. Cooley, 230 F.3d 1027, 1032 (7th Cir. 2000).

When the alleged risk to a detainee involves a medical condition, he must prove that his medical need is " one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a

doctor's attention." Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir.1997); see also id. (medical condition is sufficiently serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.") To demonstrate "deliberate indifference," petitioner must show actual knowledge by the officials of the existence of a substantial risk of harm and that the officials had considered the possibility that the risk could cause serious harm. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Ordinary negligence by prison officials is not enough to show an Eighth Amendment violation. Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir.1994); see also Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir.1996) ("Mere negligence or even gross negligence does not constitute deliberate indifference."). Prison officials "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." Farmer, 511 U.S. at 838. Farmer's standard does not require actual knowledge of an individualized threat---"it is enough that defendants are aware that their action may cause injury without being able to divine the most likely victim." Delaney v. De Tella, 256 F.3d 679, 686 (7th Cir. 2001); Farmer, 511 U.S. at 843.

With respect to the risk of harm that petitioner faced, I do not hesitate to conclude that lacerations on his head and severe bleeding constitute a serious medical need. However, petitioner's allegations do not support a finding that he needed treatment *at the time*

*respondents were questioning him*. He had just received treatment at the hospital and had been given stitches for his head injury. Petitioner's allegations do not suggest that respondents put petitioner's health at risk by asking him questions. Petitioner's after-care instructions were only that he should "rest quietly for a day," not that he could not speak or answer questions. Chapman, 241 F.3d at 846 (officers did not interfere with prescribed treatment in violation of due process when they compelled detainee with pelvic incision to climb into van with high step; doctor told detainee only that she should take steps "one at a time," not that she had to avoid steps entirely).

Respondents did not require petitioner to engage in any strenuous physical activity or to remain standing. I cannot conclude that police officers violate a detainee's right to due process when they continue to question him when he is "weak and tired." At most, petitioner's allegations support a finding that he experienced some discomfort by having to sit up rather than lie down, which is insufficient to sustain a claim under the due process clause. Tesch v. County of Green Lake, 157 F.3d 465, 476 (7th Cir. 1998) (pretrial detainees not entitled to comfortable conditions).

Petitioner alleges that he was in pain during his questioning. However, there are no allegations in petitioner's complaint that would support a finding that his pain was caused by respondents' questioning. He alleges that the pain killers given to him at the hospital were wearing off during the questioning, but he does not allege that he asked respondents

for additional medication or that they denied such a request.

The closest petitioner comes to showing that respondents' questioning caused him needless pain and suffering is his allegation that it was painful for him to talk because his face was so swollen. However, petitioner does not allege that he *told* respondents that talking was painful. Respondents cannot be held liable for disregarding pain of which they had no knowledge.

Petitioner may be correct that it would not have hindered respondents' investigative efforts if they had allowed him more time to recuperate from his injuries before questioning him. However, the Fourteenth Amendment does not require police officers to consider only a suspect's wishes in choosing a course of action. The officers may have demonstrated a lack of consideration or sympathy for petitioner but they did not violate the Constitution. To obtain relief for a due process violation, petitioner must allege facts from which it may be reasonably inferred that respondents were deliberately indifferent to a serious medical need. Because petitioner has failed to do this, his claim will be

dismissed for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED THAT

1. Petitioner Childeric Maxy's request for leave to proceed in forma pauperis on his claim that respondents Kathy Larson, Todd Fischer and Fallen Yaug were deliberately indifferent to his serious medical needs is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $ 134.44; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 5th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge